Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

THOMAS W. ARMSTRONG, D.D.S.,

Petitioner,

vs.

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether suspending the license of a dentist who without actual knowledge or negligence hires a competent but unlicensed dentist lacks rational connection to fitness to practice dentistry and therefore violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 5

Suspending the license of a dentist who without actual knowledge or negligence hires a competent but unlicensed dentist lacks rational connection to fitness to practice dentistry and therefore violates the Due Process Clause of the United States Constitution 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Bishop v. Wood, 426 U.S. 341 (1976) 5

Leary v. United States, 395 U.S. 6 (1969) 6

Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976) 5

Schware v Bd. Of Law Examiners, 353 U.S. 232 (1957) 5, 6

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. 14 ..... 2, 3

STATUTES

28 U.S.C. 1257(a) 1

N.C. Gen. Stat. § 90-41(a) 2, 6, 7

N.C. Gen. Stat. § 90-22 ..... 6, 7

PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas W. Armstrong, D.D.S., respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of North Carolina entered July 29, 1998.

OPINIONS BELOW

None of the opinions below are reported. The Final Agency Decision of respondent ("the Board") entered October 18, 1995, appears at App. 3. The Judgment of the Superior Court of Stanly County, North Carolina, entered March 7, 1997, appears at App. 8. The Opinion of the North Carolina Court of Appeals, entered April 7, 1998, appears at App. 12. The Order of the Supreme Court of North Carolina, entered July 29, 1998, appears at App. 1.

JURISDICTION

The Order of the Supreme Court of North Carolina sought to be reviewed was entered July 29, 1998. There was no petition for rehearing. This Court has subject matter jurisdiction by virtue of 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. 14, provides in pertinent part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

North Carolina Gen. Stat. § 90-41(a) provides in pertinent part that the Board has the power and authority to suspend a license to practice dentistry when the Board is satisfied that the licensee "(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which . . . can lawfully be done or performed only by a dentist . . . licensed in this State; . . . "

STATEMENT OF THE CASE

This administrative proceeding arose upon an allegation by the Board that petitioner had violated N.C. Gen. Stat. § 90-41(a)(13), *quoted supra*. After an administrative hearing the Board suspended petitioner's license, upon conditions. App. ___. Petitioner sought judicial review in the Superior Court of Stanly County, North Carolina. His Petition for Review stated:

> The Board's findings, inferences, conclusions, and decisions prejudiced the substantial rights of the Petitioner under the Constitution of the United States, including Amendments V and XIV.

The Superior Court entered judgment in favor of Petitioner. It specifically found that the action of the Board violated the Fourteenth Amendment due process clause. App. 8. The Board appealed to the North Carolina Court of Appeals and specifically assigned as error the Superior Court's ruling as to the Fourteenth Amendment. Record on Appeal in the North Carolina Court of Appeals, at 23. The Court of Appeals considered the Fourteenth Amendment issue on its merits and reversed. App. 3. Petitioner then appealed to the Supreme Court of North Carolina, and specifically raised the Fourteenth Amendment issue in terms substantially identical to those now presented to this Court. Notice of Appeal to North Carolina Supreme Court, at 2. The North Carolina Supreme Court dismissed the appeal.

The Board found as facts at its administrative hearing that petitioner was a licensed North Carolina dentist; that he employed a Dr. Conger for five weeks in 1994 and allowed Dr. Conger to practice dentistry in petitioner's office; and that Dr. Conger never held a license to practice dentistry in North Carolina. There was also undisputed testimony at the administrative hearing, and nothing in the Board's findings of facts finds or implies otherwise, that:

(a) Dr. Conger previously had been licensed in the States of West Virginia, Maryland and Washington; he had practiced dentistry in Maryland and Washington for over 13 years prior to moving to North Carolina in 1994, and had resumed practicing dentistry in Washington at the time of the hearing;

(b) During the time Dr. Conger was employed by petitioner, petitioner was informed by Dr. Conger and

reasonably believed that Dr. Conger was provisionally licensed to practice dentistry in North Carolina;

(c) Petitioner was directly and intentionally deceived and misled by Dr. Conger as to Dr. Conger's status as a provisional licensee in North Carolina;

(d) Because of this fraud and false representation, Dr. Conger was able to practice dentistry at petitioner's office between September 12, 1994 and October 17, 1994;

(e) Immediately upon learning from the Board's investigator, on October 17, 1998, of Dr. Conger's unlicensed status, petitioner stopped Dr. Conger from practicing dentistry at his office and did not thereafter allow him to do so; and

(f) Petitioner did not knowingly or intentionally employ or allow an unlicensed person to practice dentistry.

Nothing in the Board's findings, or in the record, states or implies that petitioner did not act in good faith, inadvertently and without negligence.

The unrebutted testimony before the Dental Board also shows that Dr. Conger, the unlicensed dentist, was quite competent at the practice of dentistry. He testified that he failed to pass the Board's sterilization examination, which he was required to pass to obtain provisional licensure; but, he then questioned whether he had answered several questions on the sterilization examination erroneously. His unrebutted testimony about the result of that query appears in the transcript.

> "I questioned some of the questions I had missed previously, pointed out to a staff employee . . . that I felt some of the answers I

gave were correct. She stated they would get back with me after discussing the problem with a board member . . . On November 16 I went to the board office to take the sterilization test again. At that point I had a discussion with Ms. Lockwood. It was explained to me that I did not have to take the test, that a University of North Carolina professor at the school of dentistry had agreed with me and that I had brought to light the need to revise the test . . . [A Board employee later] stated that . . . a University of North Carolina dentistry professor . . . stated that those specific answers of mine were correct." (Admin. Hearing Tr. 54-56).

ARGUMENT

Suspending the license of a dentist who without actual knowledge or negligence hires a competent but unlicensed dentist lacks rational connection to fitness to practice dentistry and therefore violates the Due Process Clause of the United States Constitution.

Under North Carolina law a professional license, such as a license to practice dentistry, is a property right. *Parker v. Stewart*, 29 N.C. App. 747, 225 S.E.2d 632 (1976). State law establishes what "property" is protected by the Due Process Clause. *Bishop v. Wood*, 426 U.S. 341 (1976). Therefore, petitioner has been deprived of a right protected by the Due Process Clause.

In *Schware v. Bd. Of Law Examiners*, 353 U.S. 232 (1957), New Mexico had denied Schware a license to practice law because in the 1930s he had been a member of the Communist Party, he had an arrest record, and he

had used aliases. This Court held that the Due Process Clause prevented the State from denying his license because:

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the Bar, but any qualifications must have a rational connection with the applicant's fitness or capacity to practice law.

353 U.S. at 239. This principle is an aspect of the more general principle that governmental action must be rational to be constitutional. *See, e.g., Leary v. United States*, 395 U.S. 6 (1969) (a presumption must be based on a rational connection between the fact proved and the fact presumed). There is no such rational connection here. The objective of the Dental Practice Act is "that only qualified persons be permitted to practice dentistry in the State of North Carolina." N.C. Gen. Stat. § 90-22. Petitioner does not deny that the Dental Practice Act as such has a legitimate objective. Obviously, unqualified dentists should not practice dentistry. And, several of the means selected by the Dental Practices Act to achieve this commendable objective have an obviously reasonable connection to the objective. For example, the Dental Board may suspend a license to practice dentistry upon a finding that the licensee is habitually chemically impaired, is physically unfit to practice dentistry, has sought to obtain fees by fraud, is incompetent, has fraudulently represented himself to be a specialist, is unsanitary, has a serious communicable disease, or the like. N.C. Gen. Stat. §§ 90-41(a)(2), (7), (11), (14), (16), (23) and (24). Each and every one of the 25 different reasons for which a dentist's

license may be suspended, N.C. Gen. Stat. § 90-41(a)(2), involves the incompetence of the dentist, his negligence, or his fraudulent or immoral conduct, save for one such requirement. Each and every one of the 25 requirements requires either incapacity to act or deliberate actions showing a guilty state of mind, save for one such requirement. That one is N.C. Gen. Stat. § 90-41(a)(13), invoked in this case, which provides that the Dental Board may suspend the license of a dentist who employs an unlicensed dentist, no matter how competent, and no matter how innocently. It does not reasonably advance the statutory purpose of permitting only qualified dentists to practice, to suspend petitioner for being the victim of Dr. Conger's fraudulent misrepresentations. There is no implication on this record that *petitioner* has badly practiced dentistry. There is not even any implication that Dr. Conger has badly practiced dentistry; indeed, he apparently knew more about sterilization than did the Dental Board. The statute has, in a most unfair way, made Petitioner his brother's keeper. The statutory purpose is that dentists be "qualified". N.C. Gen. Stat. § 90-22. Dr. Conger was not qualified in a legal or moral sense, but he was apparently quite qualified in a practical, dental sense. The means selected to protect the public from the lack of license of Dr. Conger is not, in the circumstances of this case, rational. There has been no bad dentistry. Petitioner has committed no moral or practical wrong. Petitioner is being made to suffer unreasonably for Dr. Conger's wrong. Suspending a license for inadvertent conduct is not a rational means of effecting the statutory purpose.

This is a case in which petitioner was defrauded by the unlicensed dentist he hired. Petitioner procured malpractice insurance for Dr. Conger. (Tr. 99). He was assured by Dr. Conger that he had obtained a provisional license. (Tr. 50). He knew that Dr. Conger was licensed in several other states and that he had practiced for a number of years. (Tr. 90, 92). There is no hint of moral culpability on the part of petitioner.

CONCLUSION

The Court is respectfully requested to issue its Writ of Certiorari to review the Order below.

Respectfully submitted, this 22nd day of October, 1998.

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APPENDIX

Table of Contents

Order, Supreme Court of North Carolina, July 29, 1998 ..... App. 1

Final Agency Decision, North Carolina State Board of Dental Examiners, October 18, 1995 ..... App. 3

Judgment, General Court of Justice, Superior Court Division, March 7, 1997 ..... App. 8

Opinion, North Carolina Court of Appeals, April 7, 1998 ..... App. 12

[LOGO]

SUPREME COURT OF NORTH CAROLINA

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5 August 1998

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From NC Court of Appeals
(COA97-615)
From Stanly
(95CVS933)

Re: Armstrong v. N.C. State Bd. Dental Exam
No. 184P98

Dear Mr. McDonald:

Motion by Respondent (Dental Board) to Dismiss Appeal has been filed and the following order entered:

"Motion Allowed by order of the Court in conference this the 29th day of July 1998.
s/ Webb, J.
For the Court"

Very truly yours,

Christie Speir Cameron
Clerk of Supreme Court

/s/ Carol B. Templeton
Carol B. Templeton
Assistant Clerk

Copy to:
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Mr. George Daly, Attorney at Law, For Armstrong
Ms. Anna Daly, Attorney at Law, for Armstrong
Ms. Denise Stanford Haskell, Attorney at Law, for North Carolina State Board of Dental Examiners

BEFORE THE NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS

IN THE MATTER OF:

THOMAS W.	)	
ARMSTRONG, D.D.S.	)	**FINAL AGENCY**
(License No. 4310)	)	**DECISION**

On June 2, 1995, the North Carolina State Board of Dental Examiners (Board) issued written notice of an administrative hearing to determine whether Thomas W. Armstrong, D.D.S. (Respondent) had violated G.S. §90-41(a)(13), which provides that the Board may revoke or suspend a license to practice dentistry and invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems proper if such licensee:

> "(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State."

The Notice, which was forwarded to Respondent by certified mail and duly received, set forth specific factual allegations and scheduled a public hearing for July 29, 1995 at 2:00 p.m. The hearing was conducted at the Board's offices in Raleigh on July 29, 1995 before Board members Honeycutt, Fleming, Mullen, Taylor, and Jewell, presiding. Board members Bell, Parker, and Hertzberg

did not participate in the hearing or the decision of the matter.

Based upon the record in this proceeding, the Board makes the following:

FINDINGS OF FACT

1. Respondent is licensed to practice dentistry in North Carolina and is the holder of License Number 4310, originally issued by the Board on August 1, 1977 and duly renewed through the current year.

2. At all relevant times, Respondent was engaged in the practice of general dentistry in Charlotte, North Carolina.

3. During September of 1994, Respondent employed Barry Conger, D.D.S. to practice dentistry as an associate dentist in Respondent's practice.

4. Between September 12, 1994 and October 17, 1994, Respondent allowed Dr. Conger to practice dentistry as an employee in Respondent's practice.

5. Dr. Conger was not licensed to practice dentistry in North Carolina during September and October of 1994 and has never held a license to practice dentistry in North Carolina.

CONCLUSIONS OF LAW

1. G.S. §90-41(a)(13) authorizes the Board to discipline a licensee who:

> "(13) Has employed a person not licensed in this State to do or perform any act or

> service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State."

2. G.S. §90-29 defines the practice of dentistry and prohibits any person from practicing dentistry in North Carolina unless such person is the holder of a valid license duly issued by the Board.

3. Respondent's actions, as described in Findings of Fact 3 and 4, constitute a violation of G.S. §90-41(a)(13).

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law and pursuant to the authority set forth in G.S. §90-41(a), it is ORDERED, ADJUDGED, and DECREED that:

1. License Number 4310 issued to Respondent for the practice of dentistry in North Carolina is suspended for a period of five (5) years. Respondent shall surrender his license and current renewal certificate to the Board at its offices on or before November 24, 1995. During this term of suspension Respondent may, with the Board's prior written approval, lease his dental office and equipment. Any lease approved by the Board must be in writing and must disclose fully all material terms of the transaction. In no event shall any such lease allow operation of the dental practice on behalf of or for the benefit of Respondent.

2. Respondent's license to practice dentistry shall be conditionally restored on the fifteenth (15th) day following surrender of his license to the Board, provided that Respondent comply with conditions (a) through (e) below. During the term of this active suspension. Respondent's office shall be closed to the public. Clerical personnel may be present to attend to bookkeeping, scheduling, and to refer patients needing treatment. For the remaining four years and fifty weeks:

(a) Respondent shall violate no provision of the Dental Practice Act or the Board's Rules;

(b) Respondent shall neither direct nor permit any of his employees or staff to violate any provision of the Dental Practice Act or Board's Rules;

(c) Respondent shall permit the Board or its representative to inspect and observe his office and records and interview his employees, employers, and co-workers during regular office hours;

(d) Respondent shall perform one hundred sixty (160) hours of community service dental work approved by the Board, in writing, and in advance of performed work. Within sixty days of issuance of this Decision, Respondent shall submit to the Board a written plan for compliance with this condition. After a plan is approved by the board and until such time [as] the plan is completed. Respondent shall furnish to the Board a monthly report which should include a daily tabulation of all services performed by him under the plan during the preceding month. Respondent must complete this

community service within one (1) year of the date of this Decision;

(e) Respondent shall, within ninety days of the date of this Order, take and pass the Board's jurisprudence exam.

3. If Respondent fails to comply with any provision of this Final Agency Decision or breaches any term or condition thereof, the conditional restoration of his license shall be rescinded and upon written demand, Respondent shall immediately surrender his license and current renewal certificate to the Board for four years and fifty weeks. This sanction shall be in addition to and not in lieu of any sanction the Board may impose as a result of future violations of the Dental Practice Act or of the Board's Rules.

4. If Respondent's license is actively suspended for part or all of the four years and fifty weeks as described in paragraph 3, Respondent may, in the Board's discretion, be required to demonstrate his competency to practice dentistry prior to the reinstatement of his dental license.

This the 18th day of October, 1995.

BY: /s/ Christine H. Lockwood
Christine H. Lockwood
Executive Director

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95-CVS-9333

STATE OF NORTH CAROLINA,
COUNTY OF STANLY.

IN THE MATTER OF: THOMAS W. ARMSTRONG, D.D.S., Petitioner, vs. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Respondent.	JUDGMENT (Filed Mar. 7, 1997)

On October 18, 1995, the Respondent, North Carolina Board of Dental Examiners ("Dental Board") issued its Final Agency Decision finding that Petitioner, Thomas W. Armstrong, D.D.S., had violated North Carolina General Statutes §90-41(a)13 by employing an unlicensed dentist to practice dentistry as an associate in his practice. The Dental Board suspended Petitioner's license to practice dentistry for five years, but with his license to be conditionally restored after a 15 day active suspension followed by certain probationary terms imposed for the remainder for the five year period. Petitioner sought judicial review pursuant to North Carolina General Statutes §150(B)-43 *et seq.* in apt time by filing a Petition for Judicial Review in this his county of residence. The Petition came on for hearing before the undersigned Judge

presiding at the February 17, 1997 Civil Term of Superior Court.

At the hearing the Court considered the Final Agency Decision, the Petition for Judicial Review, the Briefs of the parties, and the transcript of the hearing before the Dental Board. The Final Agency Decision makes only these Findings of Fact:

1. Respondent is licensed to practice dentistry in North Carolina and is the holder of License Number 4310, originally issued by the Board on August 1, 1977 and duly renewed through the current year.

2. At all relevant times, Respondent was engaged in the practice of general dentistry in Charlotte, North Carolina.

3. During September of 1994, Respondent employed Barry Conger, D.D.S. to practice dentistry as an associate dentist in Respondent's practice.

4. Between September 12, 1994 and 'October 17, 1994, Respondent allowed Dr. Conger to practice dentistry as an employee in Respondent's practice.

5. Dr. Conger was not licensed to practice dentistry in North Carolina during September and October of 1994 and has never held a license to practice dentistry in North Carolina.

Petitioner presented to the Dental Board uncontradicted evidence of the following facts:

(a) Dr. Conger was previously licensed to practice dentistry in the States of West Virginia, Maryland and Washington; he had practiced dentistry in Maryland and Washington for over 13 years prior to moving to North Carolina in 1994, and had resumed practicing dentistry in Washington at the time of the hearing;

(b) during the time Dr. Conger was employed by Petitioner, Petitioner was informed by Dr. Conger and reasonably believed that Dr. Conger was provisionally licensed to practice dentistry in North Carolina;

(c) Petitioner was directly and intentionally deceived and misled by Dr. Conger as to Dr. Conger's status as a provisional licensee in North Carolina;

(d) because of said fraud and false representation, Dr. Conger was able to practice dentistry at Petitioner's office between September 12, 1994 and October 17, 1994;

(e) immediately upon learning of Dr. Conger's status on October 17, 1994, from the Dental Board's investigator, Petitioner stopped Dr. Conger from practicing dentistry at his office and did not thereafter allow him to do so; and

(f) Petitioner did not knowingly or intentionally employ or allow an unlicensed person to practice dentistry. The Dental Board made no findings on these matters.

Based on its review of the Record and the arguments of counsel, the Court concluded and determined that the substantial rights of the Petitioner were prejudiced because (1) the action of the Dental Board was erroneous as a matter of law for failure to require that *mens rea* of

Petitioner be shown; and (2) that the action of the Dental Board violated the Law of the Land Clause of the North Carolina Constitution, Article I, §19, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and was arbitrary and capricious, because the punishment imposed on Petitioner was not rationally related to the statutory purpose of protecting the public from incompetent dentists.

The Final Agency Decision is, therefore, REVERSED. Petition shall recover his costs, to be taxed by the Clerk.

This the 27th day of February, 1997.

/s/ William Z. Wood, Jr.
William Z. Wood, Jr.
Superior Court Judge

NO. COA97-615
NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 1998

THOMAS W.
ARMSTRONG, D.D.S.,

Petitioner-Appellee,

v.

NORTH CAROLINA
STATE BOARD
OF DENTAL
EXAMINERS,

Respondent-Appellant.

Stanly County
No. 95 CVS 933

(Filed
Apr. 7, 1998)

Appeal by respondent from judgement entered 7 March 1997 by Judge William Z. Wood, Jr. in Stanly County Superior Court. Heard in the Court of Appeals 13 January 1988.

Bailey & Dixon, L.L.P., by Denise Stanford Haskell and Ralph McDonald, for respondent-appellant.

Dozier Miller Pollard & Murphy, by W. Joseph Dozier, Jr., and George Daly, for petitioner-appellee.

WYNN, Judge.

The issue before us is whether constitutional or common law principles prevent the North Carolina Board of Dental Examiners from sanctioning a dentist who hired a dentist unlicensed in North Carolina to practice in his office, where the Board made no findings as to the hiring dentist's culpable mental state. We hold that the Board may impose sanctions in such a case.

On 29 July 1995, the North Carolina Board of Dental Examiners conducted a hearing to determine whether Thomas W. Armstrong, a dentist licensed to practice in North Carolina, violated N.C. Gen. Stat. §90-41(a)(13), which prohibits a dentist from employing a dentist unlicensed in North Carolina. After the hearing, the Dental Board issued its Final Agency Decision, finding that:

> 1. Respondent [Dr. Armstrong] is licensed to practice dentistry in North Carolina and is the holder of License Number 4310, originally issued by the Board on August 1, 1977 and duly renewed through the current year.
>
> 2. At all relevant times, Respondent was engaged in the practice of general dentistry in Charlotte, North Carolina.
>
> 3. During September of 1994, Respondent employed Barry Conger, D.D.S. to practice dentistry as an associate dentist in Respondent's practice.
>
> 4. Between September 12, 1994 and October 17, 1994, Respondent allowed Dr. Conger to practice dentistry as an employee in Respondent's practice.
>
> 5. Dr. Conger was not licensed to practice dentistry in North Carolina during September and October of 1994 and has never held a license to practice dentistry in North Carolina.

Based on its conclusion that findings of fact three and four constituted a violation of N.C. Gen. Stat. §90-41(a)(13), the Dental Board suspended Dr. Armstrong's license for five years. The suspension involved actual surrender of his license to practice for fourteen days, and a probationary period for the remaining four

years and fifty weeks during which he could practice. The conditional return of his license required Dr. Armstrong to perform 160 hours of community service and that he take and pass a jurisprudence exam.

Dr. Armstrong appealed for review to the Stanly County Superior Court. The Superior Court reversed the Dental Board, concluding that "the substantial rights of [Dr. Armstrong] were prejudiced because (1) the action of the Dental Board was erroneous as a matter of law for failure to require that *mens rea* of [Dr. Armstrong] be shown; and (2) that the action of the Dental Board violated the Law of the Land Clause of the North Carolina Constitution, Article I, §19, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and was arbitrary and capricious, because the punishment imposed on [Dr. Armstrong] was not rationally related to the statutory purpose of protecting the public from incompetent dentists." The Dental Board appealed to this Court.

Preliminary Discussion of the Law

Article 2 of Chapter 90 of North Carolina's General Statutes sets forth regulations concerning the practice of dentistry in North Carolina and provisions governing the activities of the Dental Board. In promulgating article 2, the general assembly specifically declared the importance of the legislation for the people of North Carolina. N.C. Gen. Stat. §90-22(a) (1997) states that the "practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest."

The task of protecting the public and promoting the public interest in the competent practice of dentistry has been entrusted by the legislature to the Dental Board. *See* N.C. Gen. Stat. §90-4-22(b) (1997) (stating that the Dental Board is "the agency of the State for the regulation of the practice of dentistry in this State."). This legislative intent to entrust the Dental Board with the oversight and regulation of the practice of dentistry is evident throughout the article. In particular, N.C. Gen. Stat. §90-29(a) (1997) provides that "[n]o person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners."

In carrying out its public function, N.C. Gen. Stat. §90-41 (1997) authorizes the Dental Board to take disciplinary action against licensed dentists for various actions and omissions. Specifically relevant to this case is N.C. Gen. Stat. §90-41(a)(13) (1997), which authorizes the Board to sanction a dentist who "[h]as employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State." Under the statute, the Board may impose sanctions if it "is satisfied" that such employment or assistance has occurred. Upon such a finding, it may, among other sanctions, "[r]evoke or suspend a license to practice dentistry" and "[i]nvoke such other disciplinary measures, censure, or probative terms against a licensee

as it deems fit and proper." N.C. Gen. Stat. §90-41(a) (1997).

When reviewing a final agency decision of the Board, the Superior court sits as an appellate court. *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983). This Court and the superior court employ the same standard of review. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 560, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996).

Discussion of the Issues

I.

We first discuss our conclusion that the trial court erred by finding that "the action of the Dental Board was erroneous as a matter of law for failure to require that *mens rea* of [Dr. Armstrong] be shown."

An alleged error in statutory interpretation is an error of law, *Best v. N.C. State Board of Dental Examiners*, 108 N.C. App. 158, 161, 423 S.E.2d 330, 332 (1992), *disc. review denied*, 333 N.C. 461, 428 S.E.2d 184 (1993), and thus our standard of review for this question is *de novo*. *Brooks v. Ansco & Associates*, 114 N.C. App. 711, 716, 443 S.E.2d 89, 91 (1994).

Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Section 90-41(a)(13) makes no mention of a *mens rea* requirement.

The Dental Board argues that we should give effect to the plain meaning of the statute and require nothing

further. First, it points out that North Carolina Courts have recognized that deference is owed to an agency's interpretation of a statute, *see MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973), and that the Dental Board has determined that it is in the public interest that knowledge need not be shown before a dentist is disciplined under section 90-41(a)(13). Next, it argues that the legislature evidenced a purpose to not require a *mens rea* showing by its omission from the statute, that such a purpose is permissible under our common law principles, and that we should recognize and enforce this legislative intent. Finally, it argues that in similar situations we have held that no *mens rea* showing was required.

In response, Dr. Armstrong brings forth several justifications for the trial court's ruling. First, he contends that the general common law rule is that knowledge must be shown before a license may be revoked for hiring an unlicensed employee. He also argues that because of the penal nature of license revocation statutes, we should follow "[o]ur traditional rule . . . that when the General Assembly does not specify whether guilty knowledge, or *mens rea* is required, the necessity of its existence will nonetheless be implied." *State v. Atwood*, 290 N.C. 266, 273, 225 S.E.2d 543, 547 (1976) (Exum, J., concurring). He further cites a decision of the Texas courts, *Texas State Bd. of Dental Examiners v. Friedman*, 666 S.W.2d 363 (Tex. App. 1984), which held that knowledge had to be shown before a dentist could be disciplined under a Texas statute similar to the one of present concern. Finally, Dr. Armstrong cites to *Poultry Co. v. Thomas*, 289 N.C. 7, 220 S.E.2d 536 (1975), for support of his assertion that North Carolina

jurisprudence does not allow suspension of a professional license for an innocent mistake of fact which was not shown to have caused harm. In *State v. Hill*, this Court quoted the following with approval:

> [t]he legislature may deem certain acts, although not ordinarily criminal in themselves, harmful to public safety, health, morals, and the general welfare, and by virtue of its police power *may absolutely prohibit them*, either expressly or impliedly by omitting all references to such terms as 'knowingly', 'wilfully', 'intentionally', and the like. Such statutes are in the nature of police regulations, and it is well established that the legislature may for the protection of all the people, punish their violation *without regard to the question of guilty knowledge*
> . . . .

1 Burdick, Law of Crime §129j (1946) (emphasis added), *quoted in State v. Hill*, 31 N.C. App. 733, 735, 230 S.E.2d 579, 580 (1976), *disc. review denied*, 292 N.C. 267, 233 S.E.2d 394 (1977).

It is true that for criminal offenses, "[o]ur traditional rule . . . is that when the General Assembly does not specify whether guilty knowledge, or *mens rea* is required, the necessity of its existence will nonetheless be implied." *State v. Atwood*, 290 N.C. 266, 273, 225 S.E.2d 543, 547 (1976) (Exum, J., concurring). Furthermore, in *Poultry Co. v. Thomas*, 289 N.C. 7, 200 S.E.2d 536 (1975), our Supreme Court did indicate that a *mens rea* showing was required for crimes other than petty offenses with light punishment and for any crime involving moral

delinquency. *See id.* at 14-15, 221 S.E.2d at 541-42. However, we disagree with Dr. Armstrong that those cases require a *mens rea* showing in this case.

Even conceding the punitive aspects of a license revocations *Atwood*, as it was discussing criminal prosecutions, is distinguishable from the present case which concerns regulation of a profession in the interest of the public welfare. Similarly, in *Thomas*, a case whose underlying action was a negligence suit arising out of an automobile accident, the Court was concerned with violations of a criminal statute imposing minor penalties for driving violations. The present case is not a criminal prosecution, but rather concerns regulation of a profession. Further, the *Thomas* Court pointed out that "[b]oth federal and state court have specifically held that it is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal. This is particularly so when the controlling statute does not require the act to have been done knowingly or willfully." *Id.* at 14. 220 S.B.2d at 541-42.

Our General Assembly has stated that the "practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest." N.C. Gen. Stat. §90-22 (1997). The General Assembly also explicitly stated that it is "a matter of public interest and concern that . . . only qualified persons be permitted to practice dentistry in the State of North Carolina," *id.*, and that the Board is "the agency of the State for the regulation of the practice of dentistry in this State." N.C. Gen. Stat. §90-22(b) (1997). Accordingly,

we believe that the previously quoted rule from *State v. Hill* is controlling and therefore we do not agree that common law principles mandate a *mens rea* showing in this case.

Furthermore, in construing a similar statute we have concluded that no *mens rea* showing was required. In *Swisher v. American Home Assurance Co.*, 80 N.C. App. 718, 343 S.E.2d 288 (1986), *appeal dismissed and disc. review denied*, 318 N.C. 420, 349 S.E.2d 606 (1986), we held that there was no requirement that a psychologist knew that he was employing an unlicensed individual before he was in violation of statutes which made it a misdemeanor for a psychologist to employ a psychologist who did not posses [sic] a valid license.

Additionally, although the final interpretation of a statute is the province of the courts, *see In re Community Association*, 300 N.C. 267, 275, 266 S.E.2d 645, 651 (1980), we have traditionally given some deference to an agency's right to interpret the statutes which it administers. *See MacPherson v. City of Asheville*, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973).

Accordingly, we disagree with Dr. Armstrong and the trial court that the Dental Board cannot punish a dentist without showing that he or she knew that the person employed was unlicensed. We conclude that the trial court erred by concluding that a *mens rea* showing was required.

II.

We next discuss our conclusion that the trial court erred by finding that "the action of the Dental Board violated the Law of the Land Clause of the North Carolina Constitution, Article I, §19, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution . . . because the punishment imposed on Petitioner was not rationally related to the statutory purpose of protecting the public from incompetent dentists."

"[T]here is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowsley*, 272 U.S. 581, 596, 71 L. Ed. 422, 429 (1926), *quoted in in re Guess*, 327 N.C. 46, 57, 393 S.E.2d 833, 839 (1990), *cert. denied*, 498 U.S. 1047, 112 L. Ed. 2d 774 (1991). It is well-settled that "the State possesses the police power in its capacity as a sovereign, and in exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949); *see also Barsky v. Board of Regents*, 347 U.S. 442, 449, 98 L. Ed. 829, 838 (1954). ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health."). This power is as extensive as is necessary for the protection of the public health, safety, morals, and general welfare. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979). As the North Carolina Supreme Court has said, "the state has the power to do whatever may be

necessary to protect public health, safety, morals, and the general welfare." *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 778, 360 S.E.2d 783, 786 (1987). The United States Supreme Court has also expressed this view. *See Dent v. West Virginia*, 129 U.S. 114, 122, 32 L. Ed. 623, 626 (1889). ("The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure" such benefits.).

However, whenever the State exercises its police power, there is necessarily a deprivation of individual liberty. *In re Hospital*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973). As a result, "the legislative power is not unlimited, but is subject to specific limitations imposed by the Constitution of this State and the Constitution of the United States." *Indemnity Co. v. Ingram, Comr. of Insurance*, 290 N.C. 457, 466, 226 S.E.2d 498, 504 (1976).

Both the federal due process clause and the North Carolina constitution's Law of the Land Clause, article 1, section 19, limit the State's police power. *See McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990). If no fundamental right is implicated, under federal due process law a governmental action must pass the so-called "minimal scrutiny" test: whether the challenged action has a legitimate purpose and whether it was reasonable for the legislature to believe that the statute would achieve that purpose. *Western & Southern L.I. Co. v. Bd. of Equalization*, 451 U.S. 648, 68 L. Ed. 2d 514 (1981).

"The term 'law of the land', is synonymous with 'due process of law.' " *Ballance*, 229 N.C. at 769, 51 S.E.2d at 734. The law of the land prohibits police regulations if

they are not "Rationally related to a substantial government purpose." *Treants Enterprises*, 320 N.C. at 778-79, 360 S.E.2d at 785; *see also In re Hospital*, 282 N.C. at 551, 193 S.E.2d at 735 (stating that for a valid exercise of the police power the proposed restriction must have a reasonable relationship to the evil sought to be remedied.).

The restraint of the law of the land clause on the State's police power is, however, "flexible" in nature. *McNeill v. Harnett County*, 327 N.C. at 564, 398 S.E.2d at 482. Whether the State's exercise of its police power "is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it." *In re Hospital*, 282 N.C. at 550, 193 S.E.2d at 735. Furthermore, "[w]hen the most that can be said against [an ordinance] is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare." *In Re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938).

The parties agree that the Dental Board's action is subject to minimal, or "rational relationship" scrutiny under both the federal and North Carolina's constitutions. Under both constitutions, the Dental Board's action was permissible if it was rationally related to the legislation's purpose.

The Dental Board argues that the trial court erred when it concluded there was no rational relationship between the statute's purpose and the Dental Board's action. First, the statute has the legitimate purposes of prohibiting the employment of unlicensed dentists and maintaining the integrity of the licensing system. Second, the legislature could have reasonably believed that the statute would promote these ends by placing the burden to determine whether employees are properly licensed on the hiring dentist. Such an individual is in the best position to ensure that employees are properly licensed, and it is not unreasonable or irrational to require a hiring dentist to ensure that employees are properly licensed. The Dental Board further argues that if due diligence is exercised by a dentist, then the dentist can insulate him or herself from liability.

In response, Dr. Armstrong argues that as applied in this case section 90-41(a)(13) does not have a reasonable connection to the statutory purpose behind the Dental Practice Act, that "only qualified persons be permitted to practice dentistry in the State of North Carolina." N.C. Gen. Stat. §90-22 (1997). He points out that there was no evidence that Dr. Conger, who is licensed as a dentist in two other states, practiced incompetently. Dr. Armstrong further points out that he was misled by Dr. Conger as to his qualifications and argues that punishing him for "inadvertently" hiring an unlicensed dentist is not a reasonable means for accomplishing the statutory purpose of protecting the public from incompetent dentists.

The Dental Board's action was rationally related to a substantial government purpose. Our Supreme Court has said that "regulation of the medical profession is plainly

related to the legitimate public purpose of protecting the public health and safety." *In re Guess,* 327 N.C. 46, 51, 393 S.E.2d 833, 836 (1990), *cert. denied,* 498 U.S. 1047, 112 L. Ed. 2d 774 (1991). The legislature could reasonably believe that the practice of dentistry by individuals unlicensed in this state could be a threat to the public health.

The prohibition on the hiring of unlicensed dentists furthers this legislative policy of protecting the public from incompetent dentists. By placing hiring dentists in peril, an incentive is created for them to ensure that a potential dentist employee is in fact licensed. As the Dental Board presumably only licenses competent dentists, the public welfare is enhanced.

Furthermore, the Dental Board does not have to find a culpable mental state before sanctioning a dentist. It has long been the case that " 'the legislature may for the protection of all the people, punish the[] violation [of public welfare statutes] without regard to the question of guilty knowledge.' " *State v. Hill,* 31 N.C. App. 733, 735, 230 S.E.2d 579, 580 (1976), *disc. review denied,* 292 N.C. 267, 233 S.E.2d (1977) *(quoting* 1 Burdick, *Law of Crime* §129j (1946)). We cannot say that such a long established understanding is a violation of due process principles.

Furthermore, the fact that Dr. Conger was apparently a competent dentist does not change the result. *In re Guess,* our Supreme Court was considering a case involving the Board of Medical Examiners.

> *There is no requirement, however, that every action taken by the Board specifically identify or address a particular injury or danger to any individual or to*

> *the public.* It is enough that the statute is a valid exercise of the police power for the public health and general welfare, so long as the Board's action is in compliance with the statute.

327 N.C. at 54, 393 S.E.2d at 838 (emphasis added). Our Supreme Court then concluded that this Court "erred in requiring a showing of potential harm from the particular practices engaged in by Dr. Guess as a prerequisite to Board action. . . . *Id.*

In sum, we conclude that the trial court erred by concluding that the Board's action was not rationally related to the statute's purpose.

IV.

Finally, we discuss our conclusion that the trial court erred by concluding that "the action of the Dental Board . . . was arbitrary and capricious . . . because the punishment imposed on Petitioner was not rationally related to the statutory purpose of protecting the public from incompetent dentists."

When an agency's final action is alleged to be arbitrary or capricious, the test is whether the agency action indicates a lack of fair and careful consideration and fails to indicate any course of reasoning and the exercise of judgment. *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). Our review of the record indicates no such deficiencies. In light of our holding in this case, we do not need to consider the Dental Board's contention that the trial court erred by making further

findings of fact. The order of the trial court is reversed and the final agency decision of the Board is reinstated.

Reversed.

Judges EAGLES and WALKER concur.

Supreme Court, U.S.
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No. 98-677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THOMAS W. ARMSTRONG, D.D.S.,

Petitioner,

vs.

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent respectfully submits that when the facts are accurately presented, the real question is:

Does suspending the license of a dentist who without actual knowledge hires an unlicensed dentist lack rational connection to fitness to practice dentistry and therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

A. The Petition misrepresents the record below.

Petitioner misrepresents the facts in this case. In his Petition, Petitioner erroneously contends that the evidence before the North Carolina State Board of Dental Examiners (Dental Board) showed that Petitioner reasonably believed that Dr. Conger was provisionally licensed to practice dentistry. Petitioner had met Dr. Conger three months before he hired him and did not know him well. Petitioner did not ask to see Dr. Conger's license nor did he call the Dental Board to verify that Dr. Conger was licensed. The evidence was that Petitioner took Dr. Conger's word that he was provisionally licensed at face value. Contrary to Petitioner's assertion, the record shows that Petitioner did not exercise reasonable care to determine whether Dr. Conger was licensed. If Petitioner had called the Board office, he would have learned that Petitioner was not licensed. In fact, the Dental Board's staff first learned that Dr. Conger was practicing dentistry without a license when it received a telephone call from a pharmacist requesting verification that Dr. Conger was licensed to practice dentistry in North Carolina. After determining that Dr. Conger was not licensed, an investigation was initiated and it was determined that Dr. Conger was practicing in Petitioner's practice. A Board investigator subsequently traveled to Petitioner's office and told Dr. Conger to immediately cease the practice of dentistry because he was not licensed to practice in North Carolina.

REASONS FOR DENYING THE WRIT

The Petitioner's claim that suspending the license of a dentist who without actual knowledge or negligence hires a competent but unlicensed dentist lacks a rational connection to fitness to practice dentistry and therefore violates the Due Process Clause of the United States Constitution does not

warrant review by this Court. The question presented misrepresents the facts in this case. The decision below was a plainly correct application of settled law.

"[T]here is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926).

> It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health.

Barsky v. Board of Regents, 347 U.S. 422, 449 (1954). "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure" such benefits. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

G.S. § 90-22 sets out the purpose of the legislature in enacting the Dental Practice Act:

> [t]he practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and *that only qualified persons be permitted to practice dentistry in the State of North Carolina.* (Emphasis added).

The legislature specifically declared that the Dental Practice Act "shall be liberally construed" to instill public confidence and ensure quality dental care. *Id.* With this end in mind, the Legislature enacted G.S. § 90-41(a)(13). A license from the Dental Board is required in order to practice dentistry and signifies that the practitioner has demonstrated good moral character and successfully completed an examination administered by the Dental Board demonstrating his "proficiency in the knowledge and practice of dentistry. . . ." G.S. § 90-30. The legislature regulates the practice of dentistry to protect the public health, safety, and welfare. Prohibiting the employment of unlicensed dentists legitimately furthers the legislature's goal of protecting the public.

Another legitimate governmental objective of G.S. § 90-41(a)(13) is to maintain the integrity of the licensing system. The licensing requirements are closely tied with how the public perceives the integrity of the dental profession as a whole. The public depends on the Dental Board to examine candidates for the profession to determine their fitness for the practice of dentistry. It is in the best interest of all licensed dentists and the public that the integrity of the licensing system be maintained. G.S. § 90-41(a)(13) has a legitimate purpose, to protect the public from the unprofessional, improper, unauthorized, and unqualified practice of dentistry and to maintain the integrity of the licensing system.

In this case, the question is whether it is reasonable to discipline a dentist for employing an unlicensed dentist when the employing dentist has no knowledge that the employed dentist is unlicensed. Because G.S. § 90-41(a)(13) protects the public health and safety, it rightfully places the burden on employing dentists to exercise due diligence in hiring dentists to practice dentistry. It is not unreasonable or irrational to require hiring dentists to check into the background of their

employees who practice dentistry to ensure that they do indeed have a license to practice dentistry. To place the burden elsewhere would be unreasonable. The public is not protected if the hiring dentist fails to inquire.

Although Petitioner had no actual knowledge that Dr. Conger did not have a provisional license, Petitioner made no effort to determine whether Petitioner was licensed. Petitioner did not ask to see a license nor did he write to the Board requesting verification of licensure. Petitioner did not call the Board office to verify Dr. Conger's licensure. G.S. § 90-33 requires all dental licenses to be displayed in a conspicuous place in the license holder's office. Although Dr. Conger practiced dentistry in Petitioner's practice for over a month, Petitioner did not require Dr. Conger to display his provisional license. If Petitioner had required Dr. Conger to display his license, he would have determined that Dr. Conger indeed did not possess the provisional license. In the present case, Petitioner could have determined that Dr. Conger was not licensed, but chose not to take any action to determine Dr. Conger's licensure status. Petitioner's failure to act does not render the statute unconstitutional.

In enacting G.S. § 90-41(a)(13), the legislature has required all employing dentists to exercise due diligence to ensure that only qualified persons practice dentistry in North Carolina. Such a requirement is a reasonable means to effect the State's proper objective of the statute: to protect the public and maintain the integrity of the licensing system. Therefore, G.S. § 90-41(a)(13) is constitutional as applied in the present case. If Petitioner had exercised due diligence in requiring Dr. Conger to display his license and had called the Board to verify Dr. Conger's licensure status, he would have discovered that Dr. Conger was not licensed. Even if knowledge is required under G.S. § 90-41(a)(13), Petitioner had constructive knowledge that Dr. Conger was not licensed.

G.S. § 90-41(a)(13) was enacted to protect the public from unlicensed and presumably incompetent dentists. It is the Board's responsibility to examine all dentists to determine their fitness to practice and to grant a license upon successful completion of such examination. Placing the burden upon the hiring dentist to determine his employee's licensure status is a rational means to effect the State's proper purpose of protecting the public.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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